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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Honorable Bentley R. Price

Trial Court Case No. 2022-CP-10-01493

Pacaso, Inc. and 2 SC Lighthouse, LLC,

Appellants,

vs.

Town of Sullivan's Island, South Carolina;
Town of Sullivan's Island Board of Zoning Appeals;
and Charles Drayton, in his official capacity as Zoning Administrator;

Respondents.

APPELLANTS' FINAL BRIEF

McCULLOUGH ▪ KHAN ▪ APPEL

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STATEMENT OF THE CASE

On October 21, 2022, the Town of Sullivan's Island Zoning Administrator (the "Zoning Administrator") issued a letter that opined 3115 Ion Ave, Sullivan's Island, SC 29482 (TMS No. 529-12-00-095) (the "Property") was operating as an illegal "Vacation Rental" (the "Zoning Administrator Letter") (R. pp. 407-415.).

On November 18, 2022, Appellants Pacaso, Inc. ("Pacaso") and 2 SC Lighthouse, LLC ("Owner") timely appealed the Zoning Administrator Letter to the Sullivan's Island Board of Zoning Appeals ("BZA") (the "BZA Appeal"). (R. pp. 77-82.).

At its February 9, 2023 meeting, the BZA voted unanimously to uphold the Zoning Administrator Letter and to deny the BZA Appeal. The BZA's decision was reduced to a Final Order dated March 9, 2023, and it was mailed on March 10, 2023. (R. pp. 1-7; R. p. 97).

On March 27, 2023, Appellants timely filed a Notice of Appeal and Demand for Pre-Litigation Mediation pursuant to S.C. Code Ann. §§ 6-29-820(B), -825 and Section 21-181 of the Town's Zoning Ordinance. (R. pp. 16-25.). On July 17, 2023, the parties mediated, but it resulted in an impasse. The Proof of ADR was filed on August 7, 2023. (R. pp. 32-34.).

On August 16, 2023, Appellants timely filed a Petition for Appeal, setting forth "plainly, fully, and distinctly" why the BZA Order is contrary to law pursuant to S.C. Code Ann. § 6-29-825(F) (the "Appeal Petition"). (R. pp. 35-49.). On October 16, 2023, Respondents filed their Answer and Return to the Appeal Petition along with the Record on Appeal and Certification of Record.[1] (R. pp. 417-419; R. pp. 50-416.).

[1] The phrase "Certified Record" is used herein to refer to the record from the BZA proceedings filed with the Circuit Court pursuant to S.C. Code Ann. § 6-29-800(B) and S.C. Code Ann. § 6-29-830(A). S.C. Code Ann. § 6-29-800(B) provides that once a zoning administrator appeal is filed with the board of zoning appeals, "[t]he officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken." S.C. Code Ann. § 6-29-830(A) requires "a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions" be filed as part of the official record. The phrase "Record on Appeal" is used to refer to the Record on Appeal filed with this Court pursuant to Rule 210, SCACR.

On October 26, 2023, Appellants filed a Motion to Supplement the Record. (R. pp. 420-460.). Appellants argued the following items must be included in the Certified Record:

- A June 9, 2022 e-mail from the Zoning Administrator to the Property's neighbor, wherein, among other things, the **Zoning Administrator admits the Property was not operating as a "Vacation Rental."**
- An April 5, 2023 e-mail from the Zoning Administrator wherein he admits no enforcement action with respect to the Property can take place while the zoning appeal is on appeal with the Court of Appeals.
- Appellants' February 8, 2023 letter in support of the BZA Appeal, with exhibits, that was presented prior to and during the February 9, 2023 BZA hearing on the BZA Appeal.

On November 14, 2023, Appellants filed a memorandum in support of their Appeal Petition and Motion to Supplement the Record. (R. pp 481-529.). On November 14, 2023, Respondents filed memoranda in opposition to the Appeal Petition (R. pp 530-546.) and the Motion to Supplement the Record. (R. pp. 547-550.).

On November 14, 2023, Respondents filed Appellants' February 8, 2023 letter, with exhibits, as a supplement to the Certified Record. (R. pp. 461-480.).

On November 16, 2023, the Honorable Bentley D. Price heard both the Appeal Petition and Motion to Supplement the Record. On December 6, 2023, Judge Price issued an Order (drafted by Respondents) affirming the BZA Order, denying the Motion to Supplement the Record as moot, and denying and dismissing the Appeal Petition (the "Order"). (R. pp. 8-12.).

On December 15, 2023, Appellants filed a Motion to Reconsider. (R. pp. 551-574). On December 29, 2023, Respondents filed a memorandum in opposition. R. pp. 575-586). On January 17, 2024, Judge Price issued an Order denying the Motion to Reconsider. (R. pp 575-586.).

On January 30, 2024, Appellants timely filed and served a Notice of Appeal with this Court. (R. pp. 587-598.).

STATEMENT OF FACTS

The Town banned short-term rentals (referred to as "Vacation Rentals" in its Zoning Ordinance) over two decades ago. This appeal does not challenge the Town's ability to regulate genuine Vacation Rentals, which constitute the rental of real property to the public for a period less than twenty-eight (28) days in return for financial consideration. Rather, it challenges the Town's politically motivated, tortured attempt to extend its Vacation Rentals prohibition *to regulate how co-owners of real property agree to use and share their own property amongst themselves and their guests*. The Town's Vacation Rental prohibition does not – and cannot – regulate, much less prohibit, how co-owners of residential property decide amongst themselves to share use of the property when no rentals to the public are taking place. Doing so represents an unprecedented expansion of government authority into private contractual affairs, exceeds the scope of lawful zoning and land use regulatory authority, and constitutes a significant infringement of the property rights of co-owners of real property.

The Property

The Property is base zoned RS (Single Family Residential). (R. p. 50.). Owner is the fee simple owner of the Property, having acquired same on April 7, 2022. (R. p. 161.). Owner is a limited liability company ("LLC") and, pursuant to its operating agreement, its members "co-own and control 100% of [the Property]." (R. p. 139; R. p. 150.).

Owner contracts with Pacaso "as a full-service property manager to reduce the hassle of second home ownership." (R. p. 139.). "Pacaso retains no ownership in the home, acting solely as a property manager after sale." (R. p. 139.). These property management services include cleaning, landscaping, interior design, home and pool maintenance, and home policies and enforcement. (R. p. 143.). The co-owners each pay a monthly fee for these property management services; however,

this fee is in no way paid for or in connection with any periodic use or stay at the Property. (R. p. 62.). In fact, none of the co-owners ever pay Pacaso or anyone else money in return for any periodic use or stay at the Property as is the case with traditional short-term rentals.

Owner's operating agreement limits the number of member co-owners to eight. (R. p. 137; R. p. 139.). The operating agreement **strictly prohibits short term rentals**, precludes large events or parties, and mandates quiet hours between 9 p.m. and 7 a.m. (R. p. 141; R. p. 144; R. p. 147; R. p. 150.). The operating agreement also prohibits the "commercial use of the home." (R. p. 141.). The Property can only be used as a second home for Owner's members and their guests and must, at all times, maintain its exclusively residential character. (R. pp. 141-142; R. p. 144; R. p. 147.). "The only people who may use the home are owners and a limited number of their guests. Owners cannot use other Pacasos other than their own." (R. p. 147.). Consequently, the Property is not marketed to the general public for rentals – like traditional short-term rentals are.

The Property's co-owners do not pay nightly or weekly rental rates to Pacaso or any other party in connection with their use of the Property. The co-owners have agreed, amongst themselves, to allow Pacaso to administer an equitable arrangement for sharing the use of the Property. (R. p. 171.). This is no different than co-owners of family property agreeing amongst themselves on a framework to share the use of a co-owned beach house. Section II.1 of the Owner's operating agreement reads, in relevant part, "Owners have engaged Manager to, among other things, coordinate fair and equitable usage of the Home amongst the Owners." (R. p. 60). Pacaso, empowered by the Property's co-owners to do so, limits each co-owner to stays no longer than fourteen (14) days at a time. (R. p. 171.). However, Pacaso does not dictate or assign specific times to the members, and at no time do co-owners pay Pacaso anything in return for each periodic stay. Pacaso merely assists the Property's co-owners schedule non-overlapping stays via its proprietary

SmartStay technology. (R. p. 61; R. p. 147.). The Property's co-owners pay a $99 per month fee for use of this scheduling software, which is not paid in connection with or in return for any use or stay at the Property. (R. p. 62.).

Local Political Opposition to Appellants

Soon after Owner acquired the Property, some neighbors and Town residents complained to the Zoning Administrator and local elected officials about the Property and its perceived negative impacts.

The Property's neighbor Mark George e-mailed the Zoning Administrator on June 9, 2022. Mr. George alleged the Property was being operated as an illegal short-term rental. He asked, "who on staff can prosecute these people for violations and stop this from happening?" (R. p. 423.).

The Zoning Administrator responded a few hours later via the following e-mail:

> On Jun 9, 2022, at 1:49 PM, Charles Drayton < CDrayton@sullivansisland.sc.gov> wrote:
>
> Good afternoon Mr. George,
>
> This is certainly a concern that we are working to find the appropriate way to address, and by address, I mean eliminate. I am the point of contact for dealing with STR violations, but this occupancy structure does not fall into the category of a STR, since there is no rental contract or similar mechanism to provide for the property's use. Our legal team is working on a couple of strategies to block this circumvention of this temporary vacation use, and hopefully, one or more of those strategies will be presented to the Town Council soon. In the meantime, I think the strategies employed by the residents in Sonoma County can give some ideas for avenues where you can assist; specifically, I think that oppositional signage on adjacent properties and other activities (check out https://stoppacasonow.com/) will and do discourage potential buyers, who do not want to manifest their "vacation home" in a hostile environment, will keep Pacaso from wanting to buy future properties on the island if they can't sell their shares.
>
> Please feel free to stay in contact with me for any updates as this moves forward.
>
> Best regards,
>
> Charles
>
> **Charles Heyward Drayton | Director of Planning and Zoning**
>
> ***Town of Sullivan's Island***
>
> **2056 Middle Street**
>
> **Sulliavn's Island, South Carolina 29482**
>
> **T: 843.883.5752**
>
> cdrayton@sullivansisland.sc.gov

(the "Zoning Administrator E-mail") (R. p. 422.).

The Zoning Administrator E-mail confirms "this occupancy structure does not fall into the category of a STR, since there is no rental contract or similar mechanism to provide for the property's use." Appellants wholeheartedly agree with the Zoning Administrator.

The definition of "Vacation Rental," found at Section 21-203 of the Town's Zoning Ordinance, requires a less than twenty-eight (28) day stay be "in return for valuable consideration." The Zoning Administrator correctly recognized there is no *quid pro quo* relating to each stay at the Property ("there is no rental contract or similar mechanism"); therefore, the use is not a Vacation Rental. This has been and remains Appellants' position in this appeal, and it should have been outcome dispositive in Appellants' favor before both the BZA and the Circuit Court.

Appellants vehemently disagree, however, that it is appropriate for the Zoning Administrator "to address, and by address, I mean eliminate" a use he nonetheless admits is allowed by right and not an illegal Vacation Rental. Furthermore, it is highly inappropriate and unlawful for a Zoning Administrator to encourage "oppositional signage on adjacent properties and other activities (check out https://stoppacasonow.com/) … [to] discourage potential buyers, who do not want to manifest their 'vacation home' in a hostile environmental [and] will keep Pacaso from wanting to buy future properties on the island if they can't sell their shares."

The opposition campaign sponsored, promoted, and encouraged by the Zoning Administrator and the Town led to numerous property owners placing illegal signs in the right of way in violation of Section 21-127 of the Town's Zoning Ordinance.

At the BZA hearing, six members of the public spoke in opposition to the BZA Appeal, including the Property's neighbor Mr. George. (R. p. 113.). Many others opposed to the BZA Appeal attended the meeting, and several brought the "STOP TIMESHARES ON SULLIVAN'S" signage referenced above.

STANDARD OF REVIEW

The standard of review of the appellate court in a zoning appeal is the same as the circuit court. *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018).

"The findings of fact by the board of [zoning] appeals must be treated in the same manner as a finding of fact by a jury, and the [circuit] court may not take additional evidence." S.C. Code Ann. § 6-29-840(A). The circuit court "must determine only whether the decision of the board is correct as a matter of law." *Id*. "Issues involving the construction of ordinances are reviewed as a

matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015).

"A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "However, a decision of a city zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id*. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.,* 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *County of Richland v. Simpkins,* 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

This deferential standard of review does not mean a zoning board can never be reversed. In *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012), the Court of Appeals reversed the circuit court's decision to affirm the BZA "because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony." Further, in Bann*um, Inc. v. City of Columbia*, 335 S.C. 202, 204-05, 516 S.E.2d 439, 439-40 (1999), the Supreme Court found the zoning board's denial of a permit for an exception was arbitrary and reversed the denial. The court found the zoning board "either discounted or disregarded every single bit of evidence put up by" the appellant and "[i]nstead, it based its holding on the four factors submitted by" the opponents to the exception. *Id*. at 205, 516 S.E.2d at 440-41. Additionally, in *Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 9-10, 776 S.E.2d 753, 757-58 (Ct. App. 2015)*, the Court of Appeals affirmed the circuit court's reversal of the zoning board, finding the circuit court's decision was based on the construction of an ordinance—which was a legal conclusion, not a factual finding.

ARGUMENT

I. The Circuit Court violated state law and committed an abuse of discretion by denying Appellants' Motion to Supplement the Record with an e-mail from the Zoning Administrator wherein he admits the Property is not a "Vacation Rental," which is the central issue on appeal.

The Zoning Administrator E-mail confirms Appellants' "occupancy structure does not fall into the category of a STR, since there is no rental contract or similar mechanism to provide for the property's use." The Zoning Administrator E-mail is squarely at odds with the Zoning Administrator Letter wherein the Zoning Administrator, just a few months later, opined the Property was operating as an illegal "Vacation Rental." The Zoning Administrator E-mail is obviously and directly relevant to the central issue in this appeal – *as it reflects an interpretation of "Vacation Rental" squarely in Appellants' favor*. It also demonstrates the Zoning Administrator's and the Town's shocking animus towards Appellants and their politically motivated desire to frustrate their property rights - *no matter what*.

The Zoning Administrator E-mail was neither included in the Certified Record filed by Respondents on October 16, 2023 prior to the hearing on the Appeal Petition nor was it ever presented to the BZA in advance of its meeting. In fact, it is unclear what – if any – information was provided to the BZA by the Town prior to and at the hearing. Clearly, the Zoning Administrator E-mail was not presented to the BZA. After uncovering the Zoning Administrator E-mail by way of a Freedom of Information Act request, Appellants filed a Motion to Supplement the Record to include the Zoning Administrator E-mail.

The Circuit Court denied the Motion to Supplement the Record as moot because "it was not before the BZA, and the Circuit Court is forbidden from taking additional evidence." (R. p. 11, footnote 1). Appellants appeal this ruling as both an error of law and an abuse of discretion. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled

by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty*., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011). These e-mails should have been included in the Certified Record, by operation of law, and should have been considered by the Circuit Court in ruling on the Appeal Petition.

The composition of the Certified Record, in an appeal from a decision of the zoning administrator heard by a board of zoning appeals, is controlled by the following statutes: S.C. Code Ann. § 6-29-800(B) and S.C. Code Ann. § 6-29-830(A). S.C. Code Ann. § 6-29-800(B) provides that once a zoning administrator appeal is filed with the board of zoning appeals, "[t]he officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken." S.C. Code Ann. § 6-29-830(A) requires "a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions" be filed with the Circuit Court as part of the official record.

All material falling within the scope of S.C. Code Ann. § 6-29-800(B) ("all the papers constituting the record upon which the action appealed from was taken") must be included, by operation of law, into the "proceedings held before the board of appeals," under S.C. Code Ann. § 6-29-830(A). This statutory mandate ensures the board of zoning appeals has a full and complete record of the Zoning Administrator's files relevant to the decision on appeal.

The Zoning Administrator E-mail clearly falls within the scope of S.C. Code Ann. § 6-29-800(B). It reflects the Zoning Administrator's interpretation of the very central issue presented in Appeal Petition, namely whether the Property is operating as an illegal "Vacation Rental." Therefore, the Zoning Administrator E-mail is certainly part of "the record upon which the action appealed from was taken," was before the BZA by operation of S.C. Code Ann. § 6-29-800(B)

and should, therefore, have been made part of the Certified Record under S.C. Code Ann. § 6-29-830(A). The Zoning Administrator E-mail is not "additional evidence" the Circuit Court was precluded from considering. S.C. Code Ann. § 6-29-840(A). Rather, it should have been included in the Certified Record by operation of the statutes controlling the constitution of the record before both the BZA and the Circuit Court in zoning appeals.

In zoning appeals, the local government adverse to the appellant exclusively controls the process of assembling and filing the Certified Record before both the BZA and the Circuit Court. This is fundamentally dissimilar to the appeals process pursuant to the South Carolina Appellate Court Rules, which allows each party to designate matter to be included in the Record on Appeal. Rule 209, SCACR. Therefore, in zoning appeals it is incumbent upon the Circuit Court to police the record by ensuring material wrongfully omitted from the Certified Record, even material prejudicial to the local government's position, is included. This did not happen.

Had the Zoning Administrator E-mail been presented to the BZA and included in the Certified Record for consideration by the Circuit Court, it would have provided overwhelming support in favor of the Appeal Petition. Moreover, it would have bolstered Appellants' arguments that the BZA and the Zoning Administrator committed an error of law and were animated by arbitrary and capricious intent.

Given the foregoing, the Court should reverse the Order's conclusion that the Motion to Supplement the Record was moot and consider the Zoning Administrator E-mail part of the Certified Record when ruling on this instant appeal. In the alternative, this Court should remand the BZA Appeal to the BZA pursuant to S.C. Code Ann. § 6-29-840(A) (because "the certified record is insufficient for review") or the Circuit Court so this E-mail and all other material pursuant to S.C. Code Ann. § 6-29-800(B) can be presented and considered as required by law.

II. The Circuit Court erroneously affirmed the BZA's and Zoning Administrator's legal conclusion that the Property is being used as a "Vacation Rental."

A. This appeal involves a dispute over the interpretation of "Vacation Rental," which is a question of law (not fact), and Respondents' interpretation presents clear legal error and an abuse of discretion.

This appeal, over largely undisputed facts, presents a straightforward question of law for the Court, namely, the proper interpretation of "Vacation Rental." As such, this Court employs a far broader standard of review when compared to reviewing a zoning board's factual findings. *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("Issues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact."). The Order mischaracterizes the Respondents' interpretation of "Vacation Rental" as a factual finding entitled to great deference. (R. p. 10.). This fundamentally skewed the standard of review in this appeal in the Respondents' favor, and this constitutes reversible error.

A governing body's "intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 602 S.E.2d 76, 79 (Ct. App. 2004) (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Somers*, 319 S.C. at 68, 459 S.E.2d at 843. "In construing ordinances, the terms used must be taken in their ordinary and popular meaning." *Id*. "[W]ords in a statute must be construed in context," and "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991).

"[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (quoting *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)). In *Helicopter Sols., Inc. v. Hinde*, the Court of Appeals rejected an attempt to characterize the zoning administrator's use determination, specifically, a finding that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses in the AC zoning district" as a finding of fact entitled to significant deference on appeal. 414 S.C. at 10, 776 S.E.2d at 758. The Court found that since the zoning administrator made an "administrative interpretation" of the zoning ordinance, "[w]e agree with the circuit court that **in construing the County Ordinance**, the Zoning Administrator, and subsequently, the Zoning Board, **made a legal conclusion**." *Id*. (citing *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329) (emphasis added). Here, the BZA made a similar legal conclusion regarding the interpretation of "Vacation Rental."

The legal dispute in this case is over the proper interpretation of "Vacation Rental," which is a defined term in the Zoning Ordinance. Section 21-117 of the Zoning Ordinance provides that "Vacation Rentals are prohibited uses on Sullivan's Island." Section 21-203 of the Zoning Ordinance defines "Vacation Rental" as follows:

> Vacation Rental. The commercial use of a Principal Building(s) that is: (1) rented, leased, assigned for tenancies; or (2) made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration.

(R. pp. 57-59.).

The Zoning Administrator Letter states "[t]he stay limitation imposed by Pacaso, [Inc.] and agreed upon by the members of 2 SC Lighthouse, LLC conflicts with Article XIII of the Town's

Zoning Ordinance and the definition of 'vacation rental' found in Section 21-203." (R. pp. 407-415.). This reflects the Zoning Administrator's interpretation of "Vacation Rental," which is a legal conclusion.

To the extent any of the undefined terms contained within the definition of "Vacation Rental" are capable of competing interpretations or are considered vague or ambiguous, South Carolina law requires such terms to be liberally construed in favor of Appellants. Put another way, all benefits of the doubt in the definition of "Vacation Rental" must be construed in favor of Appellants – not the government. The Court of Appeals has observed as follows:

> It is a well-founded principle of law that "statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner."

Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 13, 776 S.E.2d 753 (Ct. App. 2015) (citing *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)); *Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.")

The zoning ordinance does not define the term "commercial," as it appears in the definition of "Vacation Rental." Dictionaries can be used to interpret undefined terms in zoning ordinances. *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) The ordinary meaning of the word "commercial" describes an activity "viewed with regard for

profit" or "designed for a large market." *Merriam-Webster Dictionary*, http://www.merriam-webster.com/dictionary/commercial.

The phrase "commercial use" – as it appears in the definition of Vacation Rental – does not refer to commercial activity, generally, but rather specific commercial activity spelled out under the express terms of the Zoning Ordinance. The phrase "in return for valuable consideration" modifies each and every prior term and phrase in the definition of "Vacation Rental." This reading is consistent with time honored rules of statutory construction. "[W]hen a clause follows several words in a statute and is applicable as much to the first word as to the others in the list, the clause should be applied to all of the words which preceded it." *Bd. of Trs. v. Judge*, 50 Cal. App. 3d 920, 926, 123 Cal. Rptr. 830, 834 (1975) (citing *Wholesale T. Dealers v. National etc. Co*., 11 Cal. 2d 634, 659, 82 P.2d 3, 17 (1938)). An alternative reading produces absurd results, which must be rejected. *Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.,* 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (holding a court will reject an interpretation when it would lead to an absurd result that could not have been intended by the legislative body); *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Properly understood, the definition of "Vacation Rental" was drafted to capture traditional rental arrangements whereby money changes hands in return for a defined, short-term stay at the property. *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995) ("In construing ordinances, the terms used must be taken in their ordinary and popular meaning."). To the extent the Appellants' contractual arrangement results in an "assignment of tenancies," which is denied, this does not take place "in return for valuable consideration." The Property's co-owners do not pay Pacaso anything in return for each stay at the

Property. They pay Pacaso only for property management and scheduling coordination services, as agreed by the Property's co-owners. (R. p. 62.).

The Zoning Administrator Letter alleges the agreement between the Property owner and Pacaso allows the latter to "control[] the usage of the home and enforce[] 'stay limitations,' which include that an owner of a 1/8 membership interest … can only book a stay for between 2 and 14 days." (R. pp. 407-415.). Assuming for the sake of argument this characterization is accurate, which it is not,[2] a mutually agreed upon "stay limitation" by the Property's co-owners does not bring the Property within the definition of "Vacation Rental." This is because there is no "commercial" rental or leasing transaction whatsoever brokered "in return for valuable consideration." No money changes hands in connection with a stay or an "assignment of tenancy." The owners do not pay Pacaso a nightly rate or fee to use the Property. This is because they own the Property. Put simply, a "stay limitation" without consideration does not constitute a "Vacation Rental."

At the end of the day, to the extent any of the undefined terms contained within the definition of "Vacation Rental" are capable of competing interpretations or are considered vague or ambiguous, South Carolina law requires such terms to be strictly construed against the Town and in favor of the free exercise of property rights. Put another way, all benefits of the doubt in the definition of "Vacation Rental" must be construed liberally in favor of Appellants – not Respondents. A review of the transcript and minutes from the BZA hearing reveals Town staff's and the BZA members' strained attempts to shoehorn Appellants in the "Vacation Rental" box from a multitude of evolving and strained angles. This is a reversible error. The BZA's role was

[2] Pacaso does not control the use of the Property. The Owner's members do by way of agreement between one another. Pacaso simply helps facilitate and manage the Owner's members' agreement to share the Property in an equitable manner.

to strictly apply the "Vacation Rental" ordinance – as written – not as how they wished it to be based on political sentiments.

This Court should resolve this appeal by performing a fresh review and analysis of the definition of "Vacation Rental." This is not a factual finding entitled to deference, as the Circuit Court erroneously concluded. Once properly interpreted, in line with the above authorities, there can be no doubt that the Property is not operating as a Vacation Rental as strictly defined by the Zoning Ordinance.

B. There is no evidence in the record to support the finding that the Property is being used as a "Vacation Rental."

The facts in this appeal are largely undisputed. Prior to and at the BZA hearing, Appellants repeatedly maintained they do not receive "valuable consideration" in exchange for stays at the Property or in connection with assignment of tenancies, which is a fundamental requirement of the "Vacation Rental" definition. There is no evidence in the record to the contrary. For instance, there are no receipts or other records of payments by the Property's co-owners to Pacaso in return for a stay.

Most of the alleged facts cited by Respondents in their brief opposing the Appeal Petition and summarily incorporated by reference into the Order, as part of the alleged "Pacaso program," are similarly not contested. Appellants do not dispute Pacaso originally acquired the Property and sold the Property to Owner, Owner's co-owner members agreed amongst themselves to an equitable framework for sharing the Property, and Owner contracts with Pacaso for property management and co-owner scheduling. However, none of these facts fall within the *specific* commercial conduct contained in the definition of "Vacation Rental."

The Circuit Court ruled otherwise, and this amounts to an abuse of discretion and arbitrary and capricious decision based on no evidence. This Court should reverse the Order and confirm

the Property is not operating as a Vacation Rental based on the lack of evidence in the record to support such a finding.

C. Respondents' interpretation effectively regulates the *ownership* of real property – not its *use* – which is a power local governments lack in South Carolina.

Like many residentially zoned properties in the Town, the Property is owned by a limited liability company. The co-owners contractually agreed amongst themselves that only they and their guests can use the Property. Rentals to members of the public (genuine and traditional "Vacation Rentals") are expressly prohibited by agreement of Owners' members. By finding this ownership and contractual structure in and of itself constitutes a "Vacation Rental," the BZA and the Circuit Court effectively sanction the regulation of how the Property is *owned* through the zoning power – not how it is *used*.

Local governments in South Carolina can surely regulate, within reason and statutory limits, how property is used through zoning. However, under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310 *et seq*. (the "Act"), local governments lack authority to regulate, through zoning or otherwise, how property is *owned*. *Sinkler v. County of Charleston*, 387 S.C. 67, 76-78, 690 S.E.2d 777, 781-82 (2010) (invalidating a county ordinance that failed to establish a development scheme as contemplated by the relevant enabling legislation and rejecting the county's argument that the flexibility and authority conferred by the enabling legislation authorized the county to employ measures beyond the scope of the enabling legislation); *Holler v. Ellisor*, 259 S.C. 283, 287, 191 S.E.2d 509, 510 (1972) (observing that local government enactments and regulations "must be authorized by the enabling act, at least, where they are enacted pursuant to the authority conferred by such act, and they can be no broader than the statutory grant of power").

Under the Act, zoning can only regulate how property is *used*. S.C. Code Ann. § 6-29-720(A)(1) (limiting zoning regulations to "the **use** of buildings, structures, and land") (emphasis added). A use in the zoning context "is '[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.'" *Heilker v. Zoning Bd. of Appeals for the City of Beaufort*, 346 S.C. 401, 407, 552 S.E.2d 42, 45 (Ct. App. 2001).[3] There is no authority in the Act allowing local governments to prohibit co-owned property, generally, or to dictate how often co-owners must occupy the property at any given time. North Carolina's appellate courts have unequivocally held zoning cannot be used to regulate how property is owned. *City of Wilmington v. Hill*, 189 N.C. App. 173, 657 S.E.2d 670 (2008); *Graham Court Associates v. Town Council of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981).

There are numerous residential properties in the Town owned jointly by friends, family members, business partners, and investors. These properties are owned as tenants in common or through limited liability companies, corporations, trusts, or other legal entities. These owners frequently visit their respective properties for stays of less than twenty-eight (28) days at a time – often by mutual agreement amongst themselves or otherwise. The suggestion that such ordinary and customary arrangements constitute unlawful "Vacation Rental" activity would send shockwaves through the community, frustrate contractual relationships, potentially trigger mortgage defaults, and cause administrative headaches – not to mention further legal challenges. Such an interpretation also produces an absurd result; therefore, it represents an arbitrary and capricious decision supported by no evidence.

[3] "[T]he substantial value of property lies in its use. If the right of use [is] denied, the value of the property is annihilated, and ownership is rendered a barren right." *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 499, 536 S.E.2d 892, 902 (Ct. App. 2000) (quoting *James v. City of Greenville*, 227 S.C. 565, 579, 88 S.E.2d 661, 668 (1955)).

Given the foregoing, Respondents' and the Circuit Court's interpretation of "Vacation Rental" affirms the regulation of property ownership – a power local governments lack. This provides additional grounds for this Court's reversal of the Order.

D. Respondents' interpretation wrongfully seeks to enforce the "spirit" of the Vacation Rental prohibition.

The meeting minutes and transcript from the BZA hearing reveals a shotgun approach by BZA members, the Zoning Administrator, and members of the public to shoehorn Appellants into the "Vacation Rental" box or otherwise find a zoning violation with respect to the Property. One such attempt involved the strained argument that notwithstanding the express language of Section 21-117 and the definition of "Vacation Rental," the Property nonetheless violated the "spirit of the law" and the "intent" of the "Vacation Rental" prohibition. (R. p. 52; R. p. 56; R. p. 97; BOZA Transcript, R. p. 246, lines 1-9; R. p. 247, lines 8-19; R. p. 345, line 10 – R. p. 346, line 2.). Appellants challenged the Town's reliance on the "spirit of the law" and "intent" provisions in the BZA Appeal and at the BZA hearing. (R. p. 80 Transcript, R. p. 265, lines 6-15; R. p. 312, lines 11-19.).

The "Intent" language Respondents rely on reads as follows:

> **Sec. 21-19. Intent, application and split zoned lots of RS-Single Family District**.
>
> **A. Intent**. It is the intent of the RS-Single Family Residential District to be developed and reserved for low-density residential purposes built in a manner that is respectful of the Island's building mass and scale, historic structures, and compatible with neighborhood character. The regulations that apply within this district are designed to encourage the formation and continuance of a stable, healthy, environment for one single family, primarily owner-occupied dwelling per lot with each lot having an area of at least one-half (1/2) acre and to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district.

(R. p. 155.).

"Intent" language in zoning ordinances is unenforceable under the void for vagueness doctrine.[4] "The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *State v. Houey*, 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007)). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

Finally, in South Carolina, there is no such thing as the "spirit of the law" when it comes to interpreting zoning ordinances. Respondents are limited, by law, to interpreting the zoning ordinances strictly and as drafted. The specific language of the "Vacation Rental" ordinance applies exclusively. The burden is on the local government to define the use to be regulated clearly and specifically. *Helicopter Solutions, Inc. v. Hinde*, *supra*.

This appeal rests solely on the express definition of "Vacation Rental." Respondents cannot lean on the "spirit of the law" or "intent" language as a fallback contingency.

III. The Circuit Court erred by affirming the BZA's legal conclusion that Appellants' use of the property violates the regulations in Section 21-19(A) of the Zoning Ordinance pertaining to the RS-Single Family District.

A. The BZA lacked jurisdiction to rule on whether Section 21-19(A) or the RS-Single Family District regulations applied because this matter was not at issue in the BZA Appeal.

The Zoning Administrator Letter, which provides the basis for this appeal, focuses exclusively on the "Vacation Rental" issue and lacks any allegations that the use of the Property violates Section 21-19(A) of the Zoning Ordinance, specifically, and the RS-Single Family District

[4] As argued below, the BZA lacked subject matter jurisdiction to consider the RS-Single Family District regulations since these issues were not raised in the Zoning Administrator Letter, which provides the basis of the instant appeal.

regulations, generally. Nevertheless, the BZA Order found "the use violates RS, single-family residential district Section 21-19, Section A, Intent, and Section 21-20(D), Prohibited Uses in the RS District, by creating a commercial use of this home that caters to multi-families on one lot, disrupts neighborhood compatibility, and is not permitted in accordance with Article XIII … ." (R. p. 1.). The Circuit Court affirmed the BZA Order's conclusions as to the alleged RS District violations. (R. p. 3.).

Neither the BZA nor the Circuit Court possessed jurisdiction to rule on the RS District issues because these issues were not included in the Zoning Administrator Letter and, therefore, not appealed by Appellants to the BZA in the BZA Appeal. The sole issue before the BZA was whether the Zoning Administrator erred in his interpretation of "Vacation Rental." S.C. Code Ann. § 6-29-800(A)(1) (the board of zoning appeals may "hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance."); S.C. Code Ann. § 6-29-800(E) (when reviewing an appeal from the zoning administrator "the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.").

The BZA lacked jurisdiction to take up and rule on other zoning issues not included in the Zoning Administrator Letter and the BZA Appeal – on the fly and at the BZA hearing. Appellants' procedural due process rights were also violated, as they lacked notice that the RS District regulations would be at issue in the BZA hearing. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.") Appellants'

letter in support of their BZA Appeal was, therefore, silent on any RS District issues. Instead, it focused entirely on the "Vacation Rental" issue.

Respondents, recognizing the weakness of their purely textual "Vacation Rental" argument, decided to smuggle in additional RS District issues at the BZA hearing and in the BZA Order. However, the BZA was without jurisdiction to consider them, and the Circuit Court should not have affirmed these conclusions. Instead, the Circuit Court should have focused exclusively on the "Vacation Rental" interpretative dispute.

B. Assuming the BZA had jurisdiction to consider the RS-Single Family District regulations, which is denied, the BZA erred by concluding Appellants' use violates same.

Assuming the RS District conclusions, namely the alleged violations of Sections 21-19 (A) and 21-20(D), were properly before the BZA and the Circuit Court, which is denied, both the BZA Order and Order suffer from legal error on the merits.

Section 21-19(A) provides as follows:

> It is the **intent** of the RS-Single Family Residential District to be developed and reserved for **low-density residential purposes** built in a manner that is respectful of the Island's building mass and scale, historic structures, and compatible with neighborhood character. The regulations that apply within this district are designed to encourage the formation and continuance of a stable, healthy, environment for **one single family, primarily owner-occupied dwelling per lot** with each lot having an area of at least one-half (1/2) acre and to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district.

(Emphasis added). (R. p. 155.).

As an initial matter, Section 21-19(A) is unenforceable as unconstitutionally vague, subjective, and arbitrary. *Toussaint v. State Bd. of Medical Examiners,* 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991) ("[a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning

and differ as to its application."). Zoning regulations must be cast in specific, objective terms to be legally enforceable. *Helicopter Solutions, Inc. v. Hinde*, *supra*. For these reasons, general "intent" and subjective policy language in zoning ordinances cannot serve as the basis for an enforcement action.

To the extent Section 21-19(A) purports to restrict ownership of RS zoned property to "owner-occupied" dwellings, this is yet another unlawful attempt to regulate the ownership of property as opposed to the *use* of property. S.C. Code Ann. § 6-29-720(A)(1) (limiting zoning regulations to "the use of buildings, structures, and land"). Such owner occupancy requirements also violate the Dormant Commerce Clause and other constitutional limitations on the regulation of private property. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). Put simply, the Town lacks the legal authority to require property owners in residential zoning districts be owner-occupied, primary residences, as this would unconstitutionally discriminate against out of towners or those desiring a second, non-primary residence home.

Finally, the Property does not violate any of the prohibited uses outlined in Section 21-19(D), which reads as follows:

> D. Prohibited uses in the RS-District.
>
> (1) Residences that contain less than one thousand (1,000) square feet of enclosed living area;
> (2) Erosion control structures.
> (3) Guest bedroom or dwelling unit for a person or persons not meeting the Zoning Ordinance's definition of "family" or not lawfully occupied in accordance with (6) below.
> (4) Mobile homes or manufactured homes.
> (5) Non-commercial horticulture or agriculture that includes poultry, bovine or swine or any other type of non-traditional animal or reptile.
> (6) Vacation Rentals other than those permitted in accordance with ARTICLE XIII.

(R. pp. 158-159.).

While not mentioned specifically, it appears Section 21-19(D)(3) and D(6) form the basis of the BZA's decision. Section 21-19(D)(6), which imposes a prohibition on "Vacation Rentals," has already been discussed above and those arguments are incorporated by reference.

Section 21-19(D)(3) does not apply to the Property based on the facts in the record. Section 21-203 defines "family" as follows:

> One or more persons occupying a single Principal Building living and cooking together as a single housekeeping unit with no such family containing over six persons unless all members are related by blood or marriage or unless there is some custodial responsibility for the unrelated family member.

The Property does not contain a separate guest bedroom or dwelling unit for a person or persons not meeting the definition of "family." The sole structure on the Property is a single-family residence. The Property is not a multi-family dwelling like a duplex or a triplex. It is not a multi-family use, as there are no separate delineated living spaces (separate kitchens, electric meters, etc.) on the Property. As previously discussed, the Owners' members have agreed amongst themselves to equitably share the use and occupancy of the Property. This arrangement provides that when one co-owner and his or her family are using and occupying the Property other co-owners and their families cannot not use the Property. This framework ensures that multiple families are not simultaneously using and occupying the Property, thus precluding any violation of Section 21-19(D)(2). There is no evidence in the record to suggest otherwise.

There are untold numbers of properties in the Town, zoned RS, that are co-owned by family members, friends, and business partners. These homes are frequently shared, used, and occupied by one or more families – sometimes simultaneously, other times not. This does not cause such homes to become "multi-family" and violate Section 21-19(D)(3). There is no evidence in the record that the Town has applied this ordinance in this fashion historically. Rather, the Property is

obviously being singled out due to blatantly obvious, prejudicial, and unconstitutional political pressure and hostility towards Appellants.

For these reasons, the Court should reverse both the BZA Order's and the Order's conclusions regarding the alleged violations of the RS-Single Family Residential District.

CONCLUSION

Appellants respectfully request the Court reverse the Order and the BZA Order. In so doing, Appellants seek an order confirming the June 9, 2022 e-mail, wherein the Zoning Administrator admits the Property is not a "Vacation Rental," shall be considered a part of the Certified Record and Record on Appeal. Appellants further seek an order reversing Respondents' interpretation of "Vacation Rental" and the prohibitions in the RS-Single Family Residential District regulations as well as a finding that Appellants' use of the Property violates neither. In the alternative, Appellants respectfully request the Court order a remand to the BZA for a rehearing pursuant to S.C. Code Ann. § 6-29-840(A) (because "the certified record is insufficient for review").

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Honorable Bentley Price

Appellate Case No.: 2024-000134
Trial Court Case No. 2022-CP-10-01493

Pacaso, Inc. and 2 SC Lighthouse, LLC,

Appellants,

vs.

Town of Sullivan's Island, South Carolina;
Town of Sullivan's Island Board of Zoning Appeals;
and Charles Drayton, in his official capacity as Zoning Administrator;

Respondents.

APPELLANTS' CERTIFICATION FOR FINAL BRIEF

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Appellants' counsel hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR, and the Supreme Court's Order of April 15, 2014.

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I certify that I have served Appellants' Final Brief and Certification for Final Brief on all parties to this matter via email to their respective counsel of record, on 13th day of December, 2024, containing the above-referenced document as an attachment in .pdf, sent to the addresses shown below.

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